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THE AUDIENCE FOR AN EVIDENCE CLASS: TEACHING TO LITIGATORS, SCHOLARS, OR BAR-EXAMINEES?

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As a law school student, I was subjected to an Evidence class that neither taught me the Federal Rules of Evidence nor prepared me for my later career as a litigator.[1] Instead, we spent an entire semester discussing philosophical theories of relevance, the policy questions surrounding the rape shield law, and the historical basis of the attorney–client privilege. I ended up learning the rules of evidence in a bar examination review class and learning how to apply the rules during my on-the-job training (some of it formal, some of it literally by trial and error). Although this phenomenon is relatively common in law school education,[2] the failure to learn any practical or useful knowledge seemed a particularly acute problem for a class like Evidence, which is essentially a class about the rules of courtroom procedure.

Once I left the practice of law and became an academic, however, my opinion on the true goals of an Evidence class—and of law school in general—began to shift. Most law schools now offer at least a handful of trial advocacy classes and clinics to teach the practical skills of litigation. And after graduation, students have their whole professional lives to apply the rules in practice. I knew from my own days as a litigator that this class was the only time the students would have the luxury of discussing and thinking critically about the deeper issues involved in the field. More fundamentally, law schools have always held themselves out as more academically oriented than other professional schools, with a mission to impart a deeper understanding of what the law is, why it exists, and how it affects society.

It is clear that many of my students do not share this view. During the first Evidence class of the semester, I hand out note cards to my students and ask them to write some basic biographical information (where they are from, past work experience, etc.). I also ask each of them why they are taking the course and what they want to get out of it. Invariably I get one or both of the

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1. I served as an Assistant District Attorney in New York County for a number of years before entering academia.

2. *See, e.g.*, Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 472–73 (2004).

following responses: (1) I want to be a litigator; and/or (2) Evidence is on the bar exam. Like me, when I was in their shoes, the students see Evidence as a very practical course meant to be applied in a very specific context. Even though as a former litigator I know there is so much more to the subject, I am still sympathetic to this goal. In short, I believe law school generally—and Evidence specifically—should both prepare students for the actual practice of the law and teach them to think critically about the policies and consequences of the law they are learning.

As far as those students (roughly half of every class) who are taking the class solely or primarily because it is on the bar, I am more ambivalent. I believe this is a perfectly legitimate and understandable reason to take Evidence, and I acknowledge (as every Evidence professor must) that many of the students in the class are taking the class for this very reason.[3] And although law school is not a bar preparation class, Evidence has a codified set of rules that all students need to learn, whether for the bar exam or for the ultimate practice of law.

In the end I believe that meeting all of these objectives is an attainable goal, especially in a class like Evidence. Evidence is unique because it rests directly on top of many of legal education's fault lines. It is an advanced class populated almost exclusively by second years and is nearly always an elective, yet it is a class taken by the vast majority of law students and it is on the Multi-State Bar Exam. It has a rich field of doctrinal theories and policy questions to ponder, but at its base is a very practical class, a pre-requisite to being a litigator. Thus, I think it provides a unique opportunity to blend black-letter law, practical application, and policy questions.

So, in designing my class, I strove to meet the challenge of satisfying all three related but distinct goals: teaching the black letter law to students who only wanted to know the material for the bar; preparing the future litigators in the class for the actual practice of law; and critically exploring the more complex policy and doctrinal questions that give rise to the field of Evidence.[4]

3. I think it is no accident that Evidence is on the Multi-State Bar Exam. Unlike other heavily populated second-year classes such as Tax or Corporations (to which I mean no disrespect), Evidence deals with fundamental issues of truth—specifically, how we find the truth when the stakes are extremely high—and how to search for the truth while still protecting important policy. More mundanely, Evidence comprises the basic set of rules for dispute resolution, and dispute resolution, broadly defined, is still a large aspect of what practicing attorneys do.

4. I believe this multi-faceted goal is easier to attain if the professor has prior experience as a trial lawyer. Such experience allows the professor to draw on real-world experiences both to demonstrate how the Rules operate in practice, and also to explain (with some credibility) why the doctrine and policy behind the Rules do actually matter to practitioners. Not all the legal philosophy and policy considerations that could be covered in Evidence matter to practitioners; many of the historical asides and philosophical musings in some of the case books are laughably irrelevant to practitioners. Here again, former trial lawyers are best equipped to sort through the

I. STRUCTURING THE CLASS: USING THE PROBLEM METHOD

When I was first teaching Evidence, the first decision I had to make was whether to teach by the traditional "case method" or by the "problem method." The "case approach" has been defined as "using texts that feature the edited versions of full judicial opinions followed by notes, questions, problems, or some combination of the three," while the "problem approach" is defined as using reading materials that "feature textual discussion almost exclusively, followed mainly by problems, with few edited opinions."[5] According to a recent survey, a slight plurality of experienced Evidence professors utilize the problem approach, i.e., 46%, while 33% primarily employ the case approach, and the remainder use a hybrid approach.[6]

The instructors who stuck with the traditional case approach stated that it was valuable for students to see the evidentiary problems in the context of a judicial opinion, since students can see how the rules of evidence operate in real life.[7] I found this justification to be questionable, since in real life the rules of evidence operate at the trial level, not at the appellate level. By contrast, problems can more efficiently set out the relevant facts for any given evidence question, and if anything are more "realistic," since they present the students with the scenario that every litigator faces: here are the facts; what is admissible? Problems can be constructed as pre-trial hypotheticals, setting out the facts and asking the students whether the crucial piece of evidence would or should be admitted, or as in-trial hypotheticals, setting out a trial transcript and asking whether they would object at a certain point and on what grounds. Both types of problems are more "realistic" than reading a detailed analysis of the issue from a judicial opinion. Add to this consideration the fact that problems are a much more efficient vehicle for demonstrating the myriad

enormous amount of doctrine surrounding the field of Evidence and present to the class the aspects of theory most pertinent to actual trial practice.

5. Calvin William Sharpe, *Evidence Teaching Wisdom: A Survey*, 26 SEATTLE U. L. REV. 569, 571 (2003).

6. *Id.* The author of the study surveyed over 300 Evidence professors, all with over ten years experience teaching the subject, and received 79 responses. *Id.* at 570.

7. *Id.* at 573–74. Professors who used the case method also cited the "value of judicial thinking regarding evidentiary issues." *Id*. at 573. This is an undeniable benefit to the case approach, but it is somewhat cumbersome. Simply put, it would be very difficult to provide an insightful judicial analysis for every application of every rule. Cases can be edited severely to just provide the facts and the ruling, but then the judicial analysis has by definition been omitted: the truncated cases are merely being used as problems. There are so many rules and exceptions to cover that the judicial analysis in cases needs to be used sparingly, for the issues which illustrate core principles of the course (e.g., the Rule 403 balancing test and the propensity / Rule 404(b) distinction) or the issues which are rooted in case law rather than rules (e.g., expert testimony and the confrontation clause).

applications of each rule,[8] and the problem method provides a stronger foundation for meeting the many goals of an Evidence class.

II. TEACHING "BLACK-LETTER LAW": USING BASIC PROBLEMS TO DEMONSTRATE CONCEPTS, COMPLEX ONES TO APPLY ANALYSIS

One difficulty that I have found with most of the problem books is that the problems presented are rather complex; rarely does a book offer the student more basic problems when introducing a subject. The most effective way of teaching new material is to first give a brief overview of the language and meaning of the rule, and then to present the students with a number of very basic examples of how the rule operates in practice. This gives the students a firm grounding of the "easy" cases, which will then help them to tackle the more complex problems that they will find in the book. If on the other hand they begin with the more complicated problems set out in the book, they have no frame of reference to judge whether the fact pattern is covered by the rule or not.

As an example, when I begin the discussion on Rule 404(b),[9] I first explain that the term "character evidence" is very broad and can mean one of three different things in Evidence law. First, it can mean that a person has a certain character trait which is "directly relevant" to the cause of action, for example in a child custody case to prove that the mother is a violent person or the father is a drunk. Second, it can mean that a person has a propensity to act a certain way based on her past behavior, and thus we will conclude that because she has a tendency to act in that way, we can infer that it is more likely she acted that way during the incident in question (or, if it is propensity for credibility, that she acted a certain way when she testified in court). Finally, "character evidence" can refer to something which is not character evidence at all, but evidence of some prior action on the part of the individual which proves some relevant aspect of the case other than the individual's character.[10] I then give them four quick and easy examples: person A is accused of breaking into a safe and there is evidence that they were previously convicted of breaking into

8. *See id*. at 572–73. In the survey of Evidence professors, many of those who used the problem approach cited efficiency as one of the primary benefits of the approach. *Id.* They also noted that "problems better capture and hold the attention of students," and that problems offer "relief from the case method" and allow one to see the rules as applied. *Id.* at 572–73.

9. FED. R. EVID. 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," but allows such evidence for other purposes such as proof of motive, identity, etc.

10. I also note (as most professors do, I suspect), that Rule 404(b) is mere surplusage, since Rule 402 already tells us that any relevant evidence is admissible unless otherwise provided by the rules, and Rule 404(a) only precludes evidence that is meant to prove issues of character. This seems to help some students, but not many of them.

the same safe (to prove knowledge);[11] person B is accused of sending threatening letters to an individual and there is evidence that the victim testified against B in a previous robbery trial (to prove motive); person C is accused of using a rare sword to kill a victim and there is evidence identifying C as the individual who stole the sword three months earlier (to prove opportunity); and person D is accused of assaulting a victim by taking the victim's shoes off and beating him about the head with the shoes and there is evidence that D assaulted a different victim using the same method two weeks earlier (to prove identity).

After reviewing these basic scenarios, the students are ready to tackle the more challenging questions in the book. George Fisher's book, for example, leads off the discussion of relevance with an excellent problem involving a computer hacker who was charged with breaking into the shipping department database for a computer company and ordering several dozen computers to be shipped (free of charge) to himself.[12] The government wanted to introduce evidence that this same defendant pled guilty to committing the same crime against the same company one month after the first incident.[13] The question is whether this evidence is essentially propensity evidence or whether it can be admitted under Rule 404(b).[14] It is a more challenging problem, but now the students have the necessary tools to evaluate it. Is hacking into a database of a computer company and ordering free computers for yourself distinctive in the same way that using someone else's shoes to beat them is distinctive? Is the knowledge it requires as specific as the combination to a safe? The answer to both questions is no, and then the students can move to the next issue: assuming there is *some* probative value in proving a distinctive modus operandi or knowledge, is it outweighed by the obvious propensity-based prejudice that will occur if the jury hears about the very similar crimes the defendant has admittedly done in the past? This leads naturally into a discussion of *United States v. Trenkler*,[15] the bomb-making case, in which the court deals with attempts to quantify similarity.[16] But all the while the students have the basic examples of the safe, the threats, the rare swords, and the shoes as vivid examples of what the rule is meant to do and as starting points for their analysis of the closer calls.

Another technique to ensure that students get a solid understanding of the basic law is to assign problems for them to do outside of class. My class has a

11. This example is also the first problem in the Nesson, Green, and Murray textbook. ERIC D. GREEN, CHARLES R. NESSON & PETER L. MURRAY, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 180 (3d ed. 2001).

12. GEORGE FISHER, EVIDENCE 144 (2002).

13. *Id.*

14. *Id.*

15. 61 F.3d 45 (1st Cir. 1995).

16. *Id.* at 52.

website on which I post a quiz every Thursday (five questions, multiple choice)—students can log on anytime over the weekend and take the quiz, and on Monday we go over the questions and discuss the answers. The website automatically grades the quiz and gives me a breakdown of all the results. The quizzes are mandatory, but the results do not count towards the students' course grade.

These quizzes serve a number of useful purposes: first, by requiring students to apply the knowledge they learned each week (as opposed to only once at the end of the semester), they immediately reinforce the concepts that have been introduced. Second, the students get instant feedback as to how well they understand the material, both in an absolute sense and relative to their classmates (since I post the average scores for each week). Finally, the quizzes provide me with important feedback about the students and the class. If I see a student performing poorly for a number of weeks in a row, I can intervene with that student immediately and see if there is a problem. More importantly, if the vast majority of the class gets a certain question wrong, I know that I have failed to effectively teach the topic to the students and can cover it again in more detail.

III. PREPARING LITIGATORS: USING EXAMPLES TO ILLUSTRATE THE RULES AND INCORPORATE TRIAL TACTICS

I also try to use my practice experience to enrich the problems that I construct for the students. Generally I try to stay away from "war stories" about my own trials, but if I can find a real-life case of my own that illustrates the point we are discussing, I believe the subject comes alive for the students. Talking about actual cases helps to bring home the fact that the rules of Evidence impact real world lives in significant ways.

My past domestic violence cases provide excellent examples of hearsay problems. The all-too-familiar standard story for domestic violence cases involves a female victim who calls the police and initially agrees to file a complaint, but then becomes uncooperative before trial and either recants or refuses to testify altogether. I first use this as an example of why the hearsay rule matters in the first place. I remember as a law student thinking: "What's the big deal about hearsay? If you can't get the declarant's statement into evidence, just call the declarant to the stand and have the jury hear their testimony live." Only when I became a prosecutor did I understand how difficult it was to find, coordinate, cajole, bully, prepare, and ultimately elicit testimony from witnesses. As a professor, I can explain this litigation reality so that students understand the significance of the hearsay rule. Declarants call 911 and describe a crime in progress but leave no trace of how to reach them again; they come to your office for an interview and then disappear off the face of the earth; they testify in the grand jury and then call you the next day and say they want to drop the charges. It is this latter category of declarants that is

the most heart-wrenching, and like many former prosecutors I have many stories of victims who have turned uncooperative, leading me on a desperate search through the hearsay exceptions to try to bring in their prior statements. Excited utterance?[17] Statement for medical diagnosis?[18] Prior statement under oath?[19] Statement against interest?[20] What does the wording of each exception provide for? What policy justifications underlie each rule, and how can we convince a judge that admitting the statement will further that justification? Inviting the students along this odyssey to evaluate the admissibility of each statement under each of the possible exceptions is an excellent confluence of black-letter law issue spotting, real-life litigation work, and consideration of policy issues.

Using real-life problems also vividly demonstrates one of the most important principles of litigation: evidence about what actually occurred in the real world is useless to a litigator if he or she can not find a way to admit it. Or, to state the maxim in its inverse form: if the jury does not hear about something, it never happened. At the beginning of every semester I tell my students that every trial is essentially a re-creation of some event in the real world—a car accident, a broken contract, a murder, etc. In order to re-create the event which is the subject of the litigation, we take jurors, who theoretically have no knowledge about the event, and essentially place them in a sensory deprivation tank, in which the only way to receive inputs is through information that is admitted into evidence—witness testimony, documents, physical evidence, stipulations, etc. A litigator is faced with the enormous challenge of building up the case from scratch by feeding the jury information one piece at a time. This elaborate system presents great challenges, since every piece of information must survive the rules of evidence, but it also presents exciting opportunities, since an effective and creative advocate can re-create an event which is quite different from the one which actually happened. And in the end, what matters is not what actually happened but what the re-creation looks like.

There are a number of techniques—some ethical, some not—that a good advocate can use to alter the picture which is presented to the jury. The most obvious legitimate technique is to block a crucial piece of information for the opponent's side—a confession, expert analysis, prior instances of similar conduct, or testimony from a beaten spouse—to create a fatal hole in the story the opponent is trying to tell. Another is to offer a piece of evidence which is unduly prejudicial to the opponent if admitted for a certain purpose, and successfully argue for its admission on other grounds. A defendant's prior

17. FED. R. EVID. 803(2).
18. FED. R. EVID. 803(4).
19. FED. R. EVID. 804(b)(1).
20. FED. R. EVID. 804(b)(3).

convictions, ostensibly offered to "impeach" him if he testifies, are the most common example of this tactic. The previous example of recanting domestic violence victims is another good example: if a victim's prior incriminating statements are inadmissible for the truth of the matter, how can you get them in front of a jury? One possibility would be to call her to the stand and impeach her with the statements she made to the police fifteen minutes after the incident. Even though the prior statements are inadmissible as substantive evidence, they make a powerful impression on a jury; possibly even more powerful because she is now denying them under obvious duress. Or if she claims not to remember at all, ask if her memory can be refreshed with her own statement to the police officer given fifteen minutes after the incident—even if she says no, the jury knows about the statement and will assume that it was incriminatory. As long as you have presented some independent substantive evidence of the crime, the case will survive a directed verdict motion and your "impeachment" questions will have made an impact on the jury, notwithstanding any limiting instructions that might be given.

There is, of course, a serious policy question as to whether it is proper or even ethical to feed the jury inadmissible evidence under the guise of "impeaching" a witness, or if it is appropriate to imply (truthfully) to the jury that there is information beneficial to your case which they are not allowed to hear. I think it is useful for students to wrestle with these ethical issues, regardless of how the students ultimately resolve them. It is also important for them to learn about tactics which are clearly illegitimate, if only so they can better defend against them.

In short, the art of trial advocacy is ensuring the jury hears everything you want it to hear and as little as possible of what the opponent wants the jury to hear. This requires mastery of the rules of evidence, not only to ensure admissibility of your own evidence and preclusion of the opponent's evidence, but also to manipulate the rules (within reason) to let the jury hear as much of your story as possible. Exposing the students to these strategic and tactical considerations both prepares them to be effective litigators and gives them a more solid foundation for the rules they are learning.

IV. EXPLORING THE DOCTRINE: USING EXERCISES TO INCORPORATE POLICY QUESTIONS

As I mentioned above, Evidence must be about more than questions of admissibility and trial tactics. Policy questions are also important, although students who are focused on the bar exam or on courtroom practice are not usually as enthusiastic about learning them. Thus, professors face a challenge in making the policy and doctrine seem relevant for the students. I believe there are three ways to convince students that they should be interested in the policy questions. First, understanding the policy behind each rule usually helps students to understand how and under what conditions the rule operates.

Second, litigators need to make policy arguments to judges when faced with close questions of evidence, especially in a field in which there is relatively little case law to guide them. Finally, many lawyers will professionally "grow up" to become policy makers in one form or another: they will serve on advisory bar committees; they will become judges that interpret rules in deciding cases; or they may in fact help to write or amend the rules.

The first method is common to many law school classes: using policy to illuminate the contours of a rule (and its exceptions) is an extremely useful way of getting students to understand both the operation of the rule and the purpose behind it. I consider this the bare minimum amount of policy that students need to know in order to practice law. In order to move beyond this basic level, I employ arguments and in-depth exercises to force students to grapple with the more fundamental policy issues in the course.

The second method—asking students to use policy arguments to support or attack a position—is also used in many other law school classes, but is especially appropriate for Evidence. Since Evidence is essentially a subject that is applied in an adversary context, it is quite natural to construct arguments between groups of students. Once again, the problem approach works best for this exercise—and as I tell my students at the beginning of each semester, Evidence problems are divided roughly into two categories: those that have definite answers and those that do not. Those that have definite answers are covered in my introductory problems and in the quizzes; those that do not have definite answers require a much more comprehensive understanding of the purposes of the rule in question in order to convince the trial judge that your interpretation is correct. Since my classes are quite large, I usually present the problem and then divide the classroom in half, with one side arguing for admission and one side for exclusion. I then give the students five minutes to discuss the problem with two or three other students and come up with persuasive arguments for their side. Here the leveraging power of cold calling works well: each small group engages in a substantive (if brief) preparation, knowing that their group may be called upon to make the argument.

After five minutes, I select one lucky group from each side to engage in a formal argument, and then let other students join in. Once again, the debate tends to be rich since all the students have engaged in a small group discussion beforehand.

Finally, there are times when the study of policy moves beyond what can be justified as necessary for being an effective litigator. Here I think Evidence professors face their greatest challenge, since neither the bar preparation students nor the future litigators will be enthusiastic about learning policy for intellectual enrichment purposes. I believe the key to encouraging students to consider deeper policy questions is to present these questions in an interactive setting and to give the students a stake in the outcome.

Three times during the semester I ask my students to write a short paper on a specific policy question: the topic is designed to force the students to consider the policy reasoning behind the rules of evidence and to think creatively about how these policies might apply in the context of proposing a specific change to the existing Evidence regime. Past assignments have included creating a new hearsay exception, nominating a rule of evidence to be abolished, or describing how the rules of evidence should be changed if juries were abolished. The papers cannot be more than three pages long—generally one page for the proposal and two pages arguing why it should be adopted—and students are not allowed to do any outside research, although they are encouraged to work together in groups. The papers are due on a Thursday, and over the three day break I am able to grade them and select four of the best ideas for an exercise on the following Monday.

The Monday exercise generally runs as follows: I hand out the four most interesting proposals to the students, and instruct the students to read through each proposal. I then put them in roles as members of the Advisory Committee and ask them to choose which of the proposals would be the best policy to implement. Students vote for a proposal by moving to a certain section of the lecture hall, so that five minutes into the class, the students have split themselves up into four groups based on which proposal they wish to support. Each group is instructed to prepare arguments for its own proposal (and against the others), and after another ten minutes of preparation, I let them begin the debate. At any point, a student is allowed to leave his or her group and join another one, so that the size of the groups (and thus the number of votes for each proposal) varies as the class progresses. Groups are also allowed to amend their own proposals, either to correct a weakness pointed out by another group or as a concession to convince more students to join them. After about fifteen minutes of debate, I dissolve the smallest group and instruct its members to join one of the remaining three; just before class ends, I dissolve the smallest of the remaining three in order to create a majority for one of the surviving two groups.[21]

There are many benefits to this exercise. First, requiring the students to write a graded paper on the issue beforehand means that each of the students has given serious and critical thought to the topic and has already formed strong opinions about the policy questions even before the class starts. This results in a very high level of discussion, much more sophisticated than would

21. When I first started running these exercises, I announced that there was a reward to the student(s) who originally authored the winning proposal, in order to give the students a feeling that something was at stake in their decision. However, after having worked on their papers for a week and then exercising their own choice for the best proposal, I have found that most students become enthusiastically engaged in the process even without an "external" consequence for the ultimate outcome.

be found in a standard class. Having students prepare their arguments and amend the proposals in groups forces them to collaborate on their ideas and goals. Allowing students to move freely between groups during the exercise results in students putting forward practical arguments intended to persuade others and then listening closely to the objections made by their opponents. Finally, giving students a personal stake in the outcome—both by requiring each of them to write and justify their own proposals before class, and by requiring them to persuade others of their chosen proposal in class—makes the students passionate about policy issues which otherwise seem theoretical and remote.

The disadvantage, obviously, is that in a large class (say, over sixty students), the individual groups can get a little unwieldy, and some students do not participate in the preparation or the argument. However, this is always a problem when professors attempt to engage in policy discussions in larger classes, and in theory, even the quietest students will be listening to the arguments more closely since they will probably be forced to change their informed decision at some point during the class.

V. CONCLUSION

When students first approach this field, the rules of evidence appear at first glance to be somewhat unruly, even at times arbitrary. But by the end of the semester I hope that most of them have grown to understand that for all the imperfections in the code, the system for the most part works—every day, in thousands of courtrooms across the country, judges conduct trials which (usually) find the truth, give the judicial system legitimacy, and protect the various policy interests that we have deemed to be important (safeguarding rape victims' privacy, ensuring confidentiality of lawyer–client relations, encouraging open plea negotiations and settlements, etc). Like the class I try to teach, the rules of evidence themselves strive to attain multiple goals, and for the most part they succeed. If students grasp this holistic nature of the subject, they will have moved beyond their original goals for the class—the bar examinees will perhaps consider a career in litigation, and the litigators will begin to appreciate the rich doctrine that underlies the subject.